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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

HANNIBAL SONNY CRUMPLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *Ex Post Facto* Clause of the United States Constitution, U.S. Const., Art. I, §9, cl. 3, prohibits retroactive application of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") to assets acquired prior to its enactment but in the course of a conspiracy where the only overt acts alleged in the conspiracy occurred after the enactment of CAFRA and had no nexus to the assets sought to be forfeited?

PARTIES TO THE PROCEEDINGS

Petitioner Hannibal Sonny Crumpler and Respondent the United States of America (represented by the United States Attorney's Office for the Northern District of Alabama) were the parties to the proceedings below.

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Hannibal Sonny Crumpler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a)[1] is unreported. *See United States v. Crumpler*, No. 06-13637 (11th Cir. Apr. 13, 2007). The opinion of the district court (App., *infra*, 16a-21a) is unreported. *See United States v. Crumpler*, No. 2:04-CR-502, Doc. 105 (N.D.Ala. Nov. 30, 2005).

JURISDICTION

The court of appeals denied the petition for rehearing on June 8, 2007 (App., *infra*, 22a).

This petition is timely filed within 90 days of that mandate. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The *Ex Post Facto* Clause of Article I of the United States Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."

28 U.S.C. § 2461(c) provides in part that "[i]f a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant the Federal Rules of Criminal Procedure."

STATEMENT OF THE CASE

This case presents the question whether the Civil Asset Forfeiture Reform Act of 2000("CAFRA") can be applied retroactively to seize assets acquired prior to CAFRA's enactment where the defendant was convicted of participation in a conspiracy that spanned the enactment of CAFRA as

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[1] References to App. are to the appendix to the petition.

a result of an overt act that occurred after passage of the statute but where there was no proof that he acquired any assets as a result of those acts, an issue upon which the federal courts disagree.

Between the mid-1990s and 2002, employees in the accounting department of HealthSouth Corporation, a publicly traded company with headquarters in Birmingham, Alabama, conspired to inflate the company's earnings and hence the price of its stock. Although not a member of the accounting department, Petitioner was charged and convicted of participating in the conspiracy to commit securities fraud, as well as submitting false statements to auditors in 2002. The primary evidence at trial regarding Petitioner's participation was the testimony of two cooperating witnesses regarding the event that occurred in 2002. According to those witnesses, Petitioner, who was no longer employed at HealthSouth, agreed to and did submit false audit confirmation letters to HealthSouth auditors in an effort to cover up the conspiracy.

Based on the conspiracy conviction, the Government sought to forfeit assets that Petitioner had acquired prior to the enactment of CAFRA and that were not directly linked to any alleged actions of Petitioner regarding the conspiracy. In particular, the Government sought forfeiture of bonuses totaling $330,000 that Petitioner had received from HealthSouth between 1996 and May 2000 and a money judgment for the fair market value of HealthSouth stock that Petitioner had acquired through the exercise of stock options in 1997.

Because there was no general forfeiture provision in effect at the time that Petitioner acquired the proceeds the Government sought to forfeit, Petitioner moved to dismiss the forfeiture count on the ground that application of CAFRA, which became effective August 23, 2000, *see* § 21, Pub. L. 106-185, 114 Stat. 202, to proceeds acquired before that date

would violate the *Ex Post Facto* Clause of the United States Constitution. The district court denied the motion, holding that Defendant's acts in 2002 were sufficient to trigger the application of CAFRA to proceeds acquired before its enactment. (App., *infra*, 20a-21a). The jury returned a guilty verdict on the forfeiture count of the indictment. The court of appeals affirmed the jury's verdict, holding that the *Ex Post Facto* Clause was not violated because Petitioner was convicted of "a conspiracy that continue[d] after the effective date of the statute." (App., *infra*, 13a)

REASONS FOR GRANTING THE WRIT

This case presents the important issue of the scope of the *Ex Post Facto* Clause as it relates to forfeiture and the ability of the government to reach back in time to seize assets. Prior to the enactment of CAFRA, there was no general criminal asset forfeiture statute. No provision of law existed that permitted criminal forfeiture for the violations charged in the indictment against Petitioner, conspiracy to commit securities fraud and false statements to auditors. It was only with the enactment of CAFRA, in particular 28 U.S.C. § 2461(c), that the criminal forfeiture of proceeds from conspiracy to commit securities fraud was permitted. *See United States v. Causey*, 309 F. Supp. 2d 917, 924 (S.D. Tex. 2004). Therefore, only property acquired after the enactment of CAFRA, or property with a nexus to illegal actions occurring after its enactment, should be subject to forfeiture under the statute.

As this Court stated in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981):

> The *ex post facto* prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings v.*

> *Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). *See Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798). Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Kring v. Missouri*, 107 U.S. 221, 229, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883); *Calder v. Bull, supra*, 3 Dall. at 387. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S.Ct. 507, 508, 59 L.Ed. 905 (1915); *Kring v. Missouri, supra*, 107 U.S., at 229, 2 S.Ct., at 449; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L.Ed. 162 (1810); *Calder v. Bull, supra*, at 395, 396 (Paterson, J.); the Federalist No. 44 (J. Madison), No. 84 (A. Hamilton).

450 U.S. at 28-29, 101 S.Ct. at 964.

This Court has long held that conspiracy is a continuing offense. *See United States v. Kissel*, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910); *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). Moreover, the courts of appeals agree that, as a general rule, application of a statute to a continuing offense that began prior to, but continued after, the effective date of the statute does not violate the *Ex Post Facto* Clause. *See, e.g., United States v. Munoz-Franco*, 487 F.3d 25, 55 (1st Cir. 2007); *United States v. Tykarsky*, 446 F.3d 458, 480 (3d Cir. 2006); *United States v.*

Hersh, 297 F.3d 1233, 1249-50 (11th Cir. 2002); *United States v. Reetz*, 18 F.3d 595, 598 (8th Cir. 1994); *United States v. Hammen*, 977 F.2d 379, 385 (7th Cir. 1992); *United States v. Torres*, 901 F.2d 205, 226 (2d Cir. 1990); *Huff v. United States*, 192 F.2d 911, 915 (5th Cir. 1951). In each of those cases, however, there was a nexus between the statute and the acts that occurred after its enactment. That nexus is what prevents such application from running afoul of the Constitution's *ex post facto* prohibitions.

In the decision below, the court of appeals eliminated the nexus requirement and held that, even though there was no nexus between Petitioner's acts in 2002 and the proceeds acquired prior to the enactment of CAFRA, those proceeds were nonetheless subject to forfeiture. This decision conflicts with a recent decision by the court of appeals for the Eighth Circuit, as well as other federal cases. In *United States v. Jennings*, 487 F.3d 564 (8th Cir. 2007), the court of appeals required the Government to show a nexus between the alleged illegal activities and the alleged proceeds after 2001. The court denied defendant's *ex post facto* claim because "[t]here was ample evidence at trial proving that the mail fraud scheme lasted beyond August 23, 2000"*and* that defendant received illegal payments after that date. *Id.* at 585-86. Similarly, the court in *United States v. Causey*, 309 F.Supp.2d 917 (S.D. Tex. 2004), recognized the full import of the *Ex Post Facto* Clause and held that, unless the Government proved a nexus between the charged crimes and the alleged illegal proceeds acquired after the enactment of CAFRA, those proceeds would not be subject to forfeiture. *Id.* at 924; *see also United States v. Schlesinger*, 396 F.Supp.2d 267, 279-80 (E.D.N.Y. 2005) (no *ex post facto* violation where defendant obtained proceeds after enactment of CAFRA).

The Eleventh Circuit's approach vitiates one of the very reasons that Congress passed CAFRA. As the House of

Representatives Judiciary Committee noted, one of the primary reasons it felt the need to enact CAFRA was to stem the tide of governmental abuse in forfeiture proceedings:

> [A] number of years ago, concerns began to be raised about abuses of civil forfeiture laws. Newspaper and television exposes appeared alleging that apparently innocent property owners unfortunate enough to match drug courier "profiles" through such acts as carrying large amounts of cash or by purchasing airline tickets with cash were having their property taken by federal and local law enforcement officers with nothing that could be called due process.
>
> Federal courts began to echo these concerns. The Second Circuit stated that "[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992). The Seventh Circuit issued a decision containing a stinging rebuke of the federal government's use of civil forfeiture. In *United States v. $506,231 in U.S. Currency,* 125 F.3d 442, 454 (7th Cir. 1997), the court found the need to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity." The court also found the need to say that "[w]e are certainly not the first court to be 'enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is

> buried in those statutes." And Supreme Court Justice Clarence Thomas has stated that, "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice." *Bennis v. Michigan,* 516 U.S. 442, 456, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) (Thomas, J., concurring).

H.R. Rep. No. 106-1048 (2001).

As can be seen from this case and others, the Government's thirst for forfeiture has not abated with the passage of CAFRA. *See, e.g., United States v. Rutledge,* 437 F.3d 917, 921-22 (9th Cir.) (Government attempted to forfeit assets of non-profit corporation defrauded by defendant), *withdrawn as moot,* 448 F.3d 1080 (2006); *United States v. Lay,* 456 F.Supp.2d 869, 871 (S.D. Tex. 2006) (Government opposed abatement of conviction of deceased defendant on ground it hoped to have a law passed nullifying the rule of abatement). Unless this Court resolves the question whether a nexus must exist between the alleged proceeds and the acts that make application of CAFRA constitutional, the Government will be able to proceed with abandon in the Eleventh Circuit and in any other jurisdiction that adopts its rationale.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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